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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

LARRY D. LYON, as Trustee, etc., Plaintiff, Cross-defendant and Appellant, v. CLIFTON C. BEARDEN, as Trustee, etc., Defendant, Cross-complainant and Appellant.	B174750 & B178694 (Los Angeles County Super. Ct. No. NC 034192)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph E. DiLoreto, Judge. Dismissed and remanded.

Lerner & McDonald, Kenneth E. McDonald, and John C. Scholz for Plaintiff, Cross-defendant and Appellant.

Argue Pearson Harbison & Myers, Stephen F. Harbison; Benedon & Serlin, Gerald M. Serlin, and Douglas G. Benedon for Defendant, Cross-complainant and Appellant.

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Respondent Clifton C. Bearden entered into a contract with appellant Larry D. Lyon for the purchase of a duplex in Long Beach. The contract called for monthly payments for a period of five years. When, after five years, the last balloon payment was due, Lyon declared that Bearden was in default and seized the property. Lyon sued, seeking to quiet title. Bearden cross-complained for specific performance. Following a hearing that was limited to arguments of counsel and the trial court's comments, the court entered a judgment that granted specific performance to Bearden and that denied Lyon relief. Lyon objected to the judgment on various grounds. We conclude that the purported judgment was not a final determination of the rights of the parties and was therefore not a judgment from which an appeal could be taken. Accordingly, we dismiss the appeal and remand the case for additional proceedings.

We first summarize the background facts that are basic to the controversy. For these facts, we rely on the terms of the contract between the parties and the course of correspondence that is reflected in the trial exhibits.[1] Next, we summarize the proceedings that led to the purported judgment that was entered and the postjudgment events, which include an award of attorney fees to Bearden totaling $38,455.

BACKGROUND FACTS

Lyon and Bearden entered into the land sale contract on April 1, 1998. The contract provided that the purchase price of this two-unit duplex was $165,000, of which $14,000 was due upon execution of the contract; that Bearden was to pay to Lyon $1,324.66 per month for five years (this payment equaled sums due on first and second trust deeds to be paid by Lyon); that the monthly payments were due on the first of every month; that the unpaid principal, together with interest thereon, was due at the end of five years; that time was of the essence; that in the event of default Lyon was to give notice thereof and Bearden had 10 days after the notice to correct the default; that if the default was not corrected, Lyon had the right to accelerate and declare due and payable all of the remaining balance; that in

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[1] We are informed by counsel that these trial exhibits were admitted into evidence by the court. The appellate record does not contain an order to this effect.

the event Lyon accelerated the remaining balance, Bearden had 30 days to pay the balance of the purchase price. The contract gave Bearden the right to immediate possession, which he exercised by leasing the property to tenants. Bearden thereafter made improvements on the property, and in the process invested his own time on the improvements.[2]

The parties agree that the property increased in value over the next five years. On April 10, 2003, Bearden wrote Lyon. The handwritten letter states: "Here is this month[']s mortgage. I wanted to get a payoff quote from you for beginning 6-1-03. My records show a beginning balance of $131,621.97. Please verify that this amount is correct." The letter closed by stating that Bearden intended to refinance the property and that Bearden would pay Lyon "in full if possible."

Attorney Mendlovitz replied for Lyon by a letter dated April 17, 2003. The letter does not contain a "payoff quote." The letter stated that the "amortization charts for both loans correctly reflect the balances owing." Mendlovitz's letter goes on to state that a missed payment in January 2003 generated $147 for attorney fees; that a further $509.77 was owing for real property taxes; that a 10 percent late payment penalty was owing; and the letter contained an attachment that reflected 35 charges for late payments for a total of $4,636.45.

According to Bearden, Lyon had never before claimed that late payment penalties were due. Bearden concluded that the April 17, 2003 letter by Mendlovitz was an attempt to put Bearden into default, so that Lyon could reclaim the property.

Bearden's reading of the situation was borne out by a letter dated May 1, 2003, also from Mendlovitz. The May 1 letter states that there had not been a response to the letter of April 17, 2003. The letter concluded: "Therefore, you have defaulted pursuant to the terms of the referenced Land Sale Contract, and Mr. Lyon, pursuant to the terms thereof, elects to exercise his option to terminate the Contract and retake possession of the real property."

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[2] Bearden's cross-complaint for specific performance alleged that he spent more than $20,000 on the improvements and expended more than 1,500 hours of his own time, at a value of over $30,000.

Lyon and Mendlovitz, respectively, wrote Bearden on May 6 and 7, 2003, returning his check for $509.77 for real property taxes. Both letters take the position that Bearden was in default as of May 1, 2003, and that Lyon had exercised his rights to take possession of the property.

Lyon locked Bearden out of the property on May 11, 2003, changed the locks, and notified the tenants to pay the rent to him, Lyon.

On May 19, 2003, attorney Harbison, counsel for Bearden, wrote Mendlovitz, stating that, under the land sale contract, Bearden had 30 days from May 1, 2003, to pay the balance of the purchase price, and that Bearden intended to do so; the letter proposed opening an escrow with Chicago Title in Los Angeles. The letter also protested Bearden's eviction from the property as a violation of the terms of the land sale contract.

Mendlovitz informed Harbison that Lyon had discharged Mendlovitz; Harbison forwarded a copy of his May 19 letter to Lyon; Lyon retained attorney Christopher. Harbison was unable to reach Christopher and on June 9, 2003, Lyon filed the instant action to quiet title. As noted, Bearden cross-complained for specific performance.

PROCEDURAL HISTORY

The minutes of the trial court reflect that a "short cause" trial was first called on February 17, 2004, that trial was continued on that date, again continued on February 23, 2004, and that the case went to trial without a jury on February 24, 2004, before Judge Joseph E. DiLoreto.

The proceedings of February 24, 2004, were reported. The proceedings commenced with the court stating that it had reviewed both trial briefs, including exhibits attached to the briefs, which included an "Agreement for the [P]urchase and [S]ale of [R]eal [P]roperty." The court noted that attorney Christopher had requested a tentative ruling that the court was willing to give "provided that I [the court] get the agreement of all counsel as to what my tentative ruling would be because I don't want to be in a position to prejudice either side on further testimony, but, just to be candid with you, there is very little doubt in the court's mind as to what this is." When attorney Harbison indicated that he had no objection to the court announcing its tentative ruling, the court proceeded to (1) reject Lyon's contention that

the agreement was an option agreement, and (2) state its conclusion that the agreement was a land sale contract. The court devoted the bulk of its observations to its conclusion that there was no ambiguity about the fact that the agreement was a land sale contract.

After registering some objections to the court's ruling that the contract was a land sale contract, attorney Christopher stated that "we can't have reinstatement in this case, the agreement has expired, expired on May 1, 2003." Harbison replied by stating that there was a 10-day grace period, and a 30-day period within which Bearden could cure any default, and that Lyon had jumped the gun by declaring a default. Harbison referred to his letter of May 2003 in which he had offered to open an escrow, which had been ignored by Lyon. Christopher said that there was nothing in the contract about opening an escrow, that Bearden had made $106,000 available on July 2, 2003, which was "woefully short of the payout." According to Christopher, Lyon's position was that the "agreement" should "have been exercised by a notice on April 1 with a pay-off on May 1," and that the "full amount to execute the agreement would not come within the provisions of a grace period."

The court agreed that the agreement had no provision for an escrow, but the court stated that an escrow would be necessary to ensure that the buyer would get a clear title. There was then a discussion about the necessity, or the lack of a necessity, of an escrow. Christopher came around to admitting that an escrow would be a good idea, provided that it would be very short.

Next, Harbison stated that Bearden had sufficient "cash in a safety deposit box" to pay for the property. Later in the hearing, Harbison stated that "Bearden has tendered performance adequately."

After some discussion about title insurance, and some comments by Christopher about "redemption,"[3] the court stated "why can't I basically just use the equity powers of the court and just order that the parties open an escrow, set a reasonable time, 60 days for

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[3] The comment appears to have been based on the contention, advanced in Lyon's trial brief, that the agreement had expired and that, for this reason, the case did not involve the right of redemption that a buyer under a land sale contract has if the buyer is in default. The trial brief cited *Petersen v. Hartell* (1985) 40 Cal.3d 102, 112 in support of this argument.

the payment of the escrow." At this point in the hearing, Christopher did not object to an escrow, but asked for a short escrow period.

Harbison returned to the point that Bearden was seeking specific performance and that Bearden was not "relying on our drop-back position of being entitled to redemption from forfeiture." Christopher's response was that "I think position of *Peterson* [see fn. 3] is, you can't have specific performance on the land sale contract in these circumstances. But with that aside, I would suggest that there would be no more than a five-day escrow." The court rejected a five-day escrow. The court then stated: "All right. Without objection, the parties are ordered forthwith, which means on or before close of business by tomorrow, to enter into an escrow with Burl [an escrow company] for the transfer of this property . . . . [¶] If the escrow has not closed as a result of anything that the buyer has done with respect to failure to perform, then the court will find that this agreement is terminated and that the purchaser is entitled to the property, I'm sorry, seller is entitled to the property by way of default of the purchaser." The court closed by stating that the escrow period was 60 days and that it would retain jurisdiction to determine attorney fees and expenses. The hearing ended with a discussion of August 19, 2004, as the date for the hearing on attorney fees, in the event the parties could not agree on the fees.

The court entered a judgment on March 9, 2004. After reciting that a jury had been waived, and the appearances by counsel for the parties, the judgment states: "The Court having considered the pleadings, the trial briefs of both parties, and the documentary evidence proposed to be introduced by both parties, the Court having considered the arguments of counsel, and the Court having been requested by the parties to render a decision based upon such proffers of proof, the matter having been submitted by the parties for decision by the Court, and a statement of decision not having been requested, [¶] IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT: [¶] 1. Plaintiff Larry D. Lyon, individually and as Trustee of the Larry D. Lyon Trust shall take nothing by his Complaint. [¶] 2. Defendant and Cross-Complainant, Clifton C. Bearden, is hereby granted specific performance of the Agreement For Purchase and Sale Of Real Property dated April 1, 1998 by and between Larry D. Lyon as seller and Clifton C. Bearden as buyer, and

is granted declaratory relief on his Cross-Complaint, as follows." The judgment then directs the parties to open an escrow on February 25, 2004 (even though the judgment was entered on March 9, 2004), the escrow period not to exceed 60 days. The judgment also provides: "If said escrow does not close as a result of anything Clifton C. Bearden has done with respect to failure to perform, then the Court will find that the Agreement For Purchase And Sale Of Real Property dated April 1, 1998 is terminated and that Larry D. Lyon, individually as Trustee of the Larry D. Lyon Trust, is entitled to the property by way of default of Clifton C. Bearden."

On March 17, 2004, Lyon filed a document entitled "Objection to Judgment and Request to Vacate Judgment." This document stated that: (1) Lyon had not been provided with an advance copy of the judgment and received the signed judgment with a notice of entry of judgment on March 10, 2004; (2) the judgment did not conform to the "court's ruling or the transcript of the proceedings. The court merely found that the agreement was a 'land sale contract' and thereafter ordered that an escrow be opened. . . . All other matters to be decided at a further proceeding . . ."; (3) "With the exception of the subject agreement, no evidence was entered or considered and the court stated that it could not go beyond the four corners of the agreement"; (4) "The court did not rule that Plaintiff take nothing by his complaint"; (5) "The court did not rule that Defendant/Cross-complainant BEARDEN was entitled to specific performance." The document closed by requesting that the court vacate the judgment.

The record does not reflect a ruling on this objection to the judgment, or on the request to vacate the judgment.

Bearden filed a motion for attorney fees on April 2, 2004.

Lyon filed a notice of appeal on April 15, 2004. The notice states that the appeal is from the judgment entered in March 9, 2004.

A hearing was held on May 4, 2004. The subject of the hearing was the motion for attorney fees that Bearden had filed on April 2, 2004. The hearing commenced with an inquiry by the court why the matter was being heard, since the matter of fees had been set for August 19, 2004. In response, Harbison, Bearden's counsel, stated that he did not want

to postpone filing the motion for attorney fees. Harbison went on to state that Bearden had paid $141,000 into escrow, but that as soon as that was done, Lyon had filed a notice of appeal, and demanded that the escrow hold the $141,000 "pending appeal." Christopher challenged the representation that Bearden "placed all his money in at the time we filed the notice of appeal."

The court stated that it did not appear that there was a problem with the August 19, 2004 date for the motion on fees "because the court still hasn't officially entered the judgment, have we?" Harbison responded that a judgment had been entered in March, and that this started the time running on the motion for attorney fees. Christopher responded: "And with that, Your Honor, the first I saw of the proposed judgment was when it had been the judgment [*sic*], and I immediately filed an objection to the judgment, and that occurred March 9th. [¶] I had some problems with the way the judgment was written. [¶] THE COURT: Is there an objection coming? What's with respect to the judgment? [¶] MR. CHRISTOPHER: Well, the judgment references things that aren't supported by the record. There was no determination by the court as to under what basis we were going forward on the escrow. And there is an issue as to that. [¶] If it's under an, in this particular case, if it was under a redemption, a right of redemption, then there's certain amount of money that would be entitled to Mr. Lyon at that point which is what we were anticipating was going to be addressed on August 19th. If it was in fact under a specific performance, for a breach of contract, that's a different issue, and the record doesn't support how the judgment was drafted by -- [¶] THE COURT: Do you have an objection that I will deem this motion timely filed and that that will continue award [*sic*], continue this hearing to August the 9th? [¶] MR. CHRISTOPHER: August 19th." The hearing ended with an agreement that the attorney fees motion would be heard on August 19, 2004.

The final hearing in this case was held on September 30, 2004. The hearing was taken up with argument by counsel on the matter of attorney fees. The court took the matter under submission and later issued its ruling awarding Bearden fees totaling $38,455.

DISCUSSION

"A judgment is the final determination of the rights of the parties in an action or proceeding." (Code Civ. Proc., § 577.) Code of Civil Procedure section 904.1, subdivision (a) provides that an appeal may be taken from a judgment. "Although the statutory language [section 904.1, subd. (a)] avoids the familiar term 'final judgment,' it conveys the same meaning by excepting 'interlocutory judgment.' The intent of the language is to codify the *final judgment rule*, or rule of *one final judgment*, a fundamental principle of appellate practice in the United States. The theory is that piecemeal disposition and multiple appeals in a single action would be oppressive and costly, and that a review of intermediate rulings should await the final disposition of the case." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 58, p. 113.)

The judgment entered on March 9, 2004, is not a final judgment. In relevant part, the purported judgment states: "If said escrow does not close as a result of anything Clifton C. Bearden has done with respect to failure to perform, then the Court will find that the Agreement For Purchase And Sale Of Real Property dated April 1, 1998 is terminated and that Larry D. Lyon, individually as Trustee of the Larry D. Lyon Trust, is entitled to the property by way of default of Clifton C. Bearden." In other words, *if* the escrow does not close *and* this is, in some way, the result of Bearden's "failure to perform," Lyon is "entitled to the property." This means that Lyon recovers on his action, which seeks to quite title in his favor. This would be in conflict with paragraph 1 of the purported judgment, which states that Lyon "shall take nothing by his Complaint." Thus, the purported judgment is contingent on a future event, which is the closing of the escrow. It may be that this event does not occur, in which event the purported judgment is undone. If the escrow did not close because of an alleged failure on the part of Bearden "to perform," not only would the purported judgment be nullified, there would have to be additional proceedings when the fact of Bearden's failure to perform would have to be established and, if and when this was established, a new judgment would have to be entered in favor of Lyon.

The hearing of February 24, 2004, confirms that no final judgment was entered in this case. While the "judgment" entered on March 9, 2004, purports to grant specific

performance to Bearden, the record is without the facts upon which such a grant is based. As an example, one of the elements of an action for specific performance[4] is performance or tender or excuse for nonperformance of all conditions precedent. (See 5 Witkin, Cal. Procedure, *supra*, Pleading, § 756 et seq.) There are no facts of record that speak to this requirement of specific performance. Counsel's *representation* that Bearden had sufficient "cash in a safety deposit box" is not a fact. Indeed, as our summary of the proceedings of February 24, 2004, shows, there are no facts of record on any of the issues that are basic to the controversy between Lyon and Bearden. This follows from the fact that the proceedings of February 24, 2004, were limited to a discussion of whether the contract was a land sale, or an option, contract and, once this topic was exhausted, to a discussion about opening an escrow. There was never an attempt, or even a suggestion, to consider any evidence.

Bearden's contention[5] that this judgment is appealable as an interlocutory judgment under Code of Civil Procedure section 904.1, subdivision (a)(8) is without support in the record.[6] First, the plain text of the judgment shows that it was not a judgment redeeming a mortgage; in fact, there was no mortgage to redeem. Second, a judgment redeeming a mortgage must be based on *some* evidence, and here there was no evidence presented or taken on any issue.

For the benefit of court and counsel in any further proceedings, we note that the trial court erred in limiting itself to finding that the contract between Lyon and Bearden was a land sale contract. There is far more at issue than the classification of the contract. As the

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4 For the elements of specific performance, see 5 Witkin, California Procedure, *supra*, Pleading, section 741.

5 Prior to oral argument we notified the parties that we were considering the question, not briefed by the parties, whether the judgment was final and appealable. (Gov. Code, § 68081.) The parties were given an opportunity to brief this question.

6 Subdivision (a)(8) of section 904.1 of the Code of Civil Procedure provides that an appeal may be taken "[f]rom an interlocutory judgment, order, or decree, hereafter made or entered in an action to redeem real or personal property from a mortgage thereof, or a lien thereon, determining the right to redeem and directing an accounting."

correspondence between the parties during April and May 2003 shows, whether the contract expired on April 1, 2003, whether Bearden was in default on or before April 1, 2003, whether Bearden was entitled to cure the default, if he was in default, and whether Bearden satisfied the requirements for a decree of specific performance are all open questions that must be resolved. (Our list of unresolved questions of fact is only partial and not exhaustive.) Indeed, Lyon's trial brief, which was filed prior to the hearing held on February 24, 2004, contends that the agreement expired before Bearden exercised his right to purchase the property. The trial brief also sets forth facts, which, if true, tend to show that Bearden was in default and was therefore not entitled to specific performance. The trial brief also contends, with supporting facts, that Bearden did not tender performance under the agreement with Lyon. In sum, the record reflects that there are multiple contested questions of fact to be resolved.

There is a further reason why the purported judgment entered on March 9, 2004, is not a final, appealable judgment. Since several issues of fact remain to be determined, the trial has not as yet concluded, assuming that the trial was commenced on February 24, 2004. "When a court hears *and determines* any issue of fact *or of law for the purpose of determining the rights of the parties*, it may be considered a trial." (*Southern Pacific Co. v. Seaboard Mills* (1962) 207 Cal.App.2d 97, 102, first italics added.) It requires no further citation of authority that when a trial has not concluded, a final judgment cannot be entered.

We make one further point for the benefit of any future proceedings. Ordering the parties to open an escrow for the sale of the property to Bearden, and requiring a sale to Bearden by Lyon, puts the cart before the horse. Such an order is necessarily predicated on the conclusions that Bearden was not in default (or that he cured a default), and that he was entitled to purchase the property under the contract. As Lyon's trial brief (and his brief on appeal) makes clear, these conclusions are all contested. Thus, absent a resolution of contested issues of fact, the trial court's order directing that an escrow be opened for the purpose of effecting a sale of the property by Lyon to Bearden was in error.

One additional point requires clarification. We disagree with Bearden that there was stipulation that the court could decide the case on the basis of the pleadings, the trial briefs,

documentary evidence and the arguments of counsel. Our search of the record has not disclosed such a stipulation, nor have the parties, including Bearden, identified or located in the record a stipulation to submit the entire case for decision by the court. We also disagree with Bearden that the "burden" of "proving" the *nonexistence* of such a stipulation is on the appellant. It is Bearden, and not Lyon, who is claiming that there *was* such a stipulation.[7] Since it is Bearden who is making a claim that is not supported by the existing record, it is Bearden's responsibility to provide the record that supports this claim. Rule 4(a)(2) of the California Rules of Court empowered respondent Bearden to designate any additional proceedings to be included in the record. Not having done so, Bearden cannot shift what was his responsibility to Lyon.[8]

While it is true that there is a recitation in the purported judgment that the parties requested a decision by the court based on the aforesaid materials, there is no evidence in the record that shows that the parties stipulated to submit the entire case for decision by the court. Indeed, there is evidence in the record that affirmatively shows that there was no such stipulation. Lyon's objections to the judgment, filed on March 17, 2003, as well as Christopher's comments during the hearing of May 4, 2004, confirm that there was no stipulation to submit the case for decision based on the pleadings, the trial briefs, documentary evidence and the arguments of counsel. Indeed, a perusal of the record of the proceedings of February 24, 2004, shows that, in substance, Lyon's objections to the proposed judgment, filed on March 17, 2004, were well taken.

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[7] During oral argument, counsel for Bearden stated that he had been informed by trial counsel that there was a stipulation. Also at oral argument, counsel for Lyon denied that a stipulation to submit the entire case for decision had been entered into.

[8] Bearden's claim that it is appellant's responsibility to submit an adequate appellate record is a generalization that does not fit the specific problem posed by *Bearden's* assertion of a fact that is not to be found in the existing record. Bearden's argument amounts to the implausible proposition that when a respondent *conceives* of a "fact" that favors the respondent, the appellant must *disprove* the existence of that "fact," otherwise that "fact" is deemed established.

For the reasons indicated, we conclude that the appeal is not taken from a final judgment and must for that reason be dismissed. We have considered and rejected Bearden's request to treat this appeal as a petition for an extraordinary writ. The circumstance that the facts of record, to the extent they exist, are fragmentary and incomplete forecloses review by extraordinary writ, even if other conditions of such relief were to obtain, and they do not obtain.

Since we have concluded that there are no facts of record that support the purported judgment entered on March 9, 2004, we vacate and set aside that purported judgment. We remand the matter with directions to the trial court to complete the trial of this case by hearing and determining the evidence, and by entering judgment based on that evidence. We also vacate and set aside the award of attorney fees and costs.

DISPOSITION

The appeal is dismissed and the case is remanded for further proceedings that are consistent with this opinion. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

FLIER, J.

We concur:

RUBIN, Acting P. J.

BOLAND, J.